
JOANNE BRANHAM, Individually and as the
Administratrix of the Estate of FRANKLIN
DELANO BRANHAM

Plaintiffs,

v.

ROHM AND HAAS COMPANY, et al.

Defendants.

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

MAY TERM, 2006
NO. 003590

ORDER

AND NOW, this ___ day of _____, 2010, upon consideration of Defendants Rohm and Haas Company, Rohm and Haas Chemicals LLC, and Morton International, Inc.'s Motion to Compel Production of Dr. Neugebauer's New Expert Analysis, and any response thereto, it is hereby ORDERED that the Motion is GRANTED.

It is further ORDERED that plaintiff must produce Dr. Richard Neugebauer's new expert analysis, along with all information and data relating to that analysis that Dr. Neugebauer obtained from the Illinois State Cancer Registry, within one week of the date of this Order.

BY THE COURT:

Tereshko, J.

a revised report by Dr. Neugebauer — and then has repeatedly failed to submit any such report. *Defendants oppose permitting any new or revised expert report by Dr. Neugebauer, and they object to any effort by plaintiff to change the expert record at this late date, just two months before trial.* But, if plaintiff plans to seek permission for Dr. Neugebauer to testify at trial about his purportedly revised report, the rules unequivocally require plaintiff to provide defendants with these materials. Her failure to do so in a timely fashion severely prejudices defendants' ability to prepare for the fast-approaching trial in this case.

In support of this motion, defendants state as follows:

1. The discovery cut-off in this case was over a year ago, June 12, 2009, and the expert report deadline was even earlier — in March 2009. *See* 5/8/09 Revised Case Mgmt. Order. Nevertheless, plaintiff now seeks to change the expert record in the case just before trial. Dr. Neugebauer submitted his expert report in this case on November 6, 2008. The report says nothing about ISCR data and does not disclose any intention to prepare a new analysis based on such data.

2. Almost two months ago, on April 27, 2010, plaintiff e-mailed defendants that Dr. Neugebauer was doing a new analysis of brain cancer rates based on data he had received from the ISCR. (Exhibit A hereto.) Plaintiff said that while the data were confidential (and presumably would not be disclosed voluntarily), Dr. Neugebauer planned to prepare a new report setting out his “analysis and interpretation” of the confidential data. (*Id.*) Plaintiff said this report would be produced “as soon as possible.” (*Id.*)

3. Plaintiff's e-mail came just a month before the original June 2010 trial date, and it came as a surprise. Not only had Dr. Neugebauer's report said nothing about a new analysis, but plaintiff's pretrial memorandum dated August 31, 2009 was equally silent on this subject. Instead of flagging the issue, plaintiff represented that this case was ready for trial. *See* 8/31/09 Pl. Pretrial Mem. at 3. And while her counsel might have contemplated having Dr. Neugebauer perform new analyses based on ISCR data for use in some of his other cases, what matters here is this case. Prior to April 27th, defendants had no notice that Dr. Neugebauer was preparing for use in this case a new analysis based on ISCR data.

4. Defendants are still waiting to receive Dr. Neugebauer's new report, which apparently was completed more than a month ago. In a letter dated May 19, 2010, plaintiff wrote defendants that Dr. Neugebauer had finished his report, but that plaintiff could not produce it until the ISCR had "verified" the data Dr. Neugebauer had used. (*See* Exhibit B hereto.) The letter stated that "we expect word from [the ISCR] in the next couple of weeks." (*Id.*) A "couple of weeks" have since turned into more than a month, and defendants still do not have the promised report or even a date certain for production of this report.

5. Plaintiff knows that if and when the report is eventually produced, it will be of no use to defendants (who must prepare a response) without the "confidential" data on which it is based. In his letter of May 19, plaintiff's counsel mistakenly represented that defendants could access that data if they "join[ed] in [Dr. Neugebauer's ISCR] request" by "pay[ing] the fee and sign[ing] a similar confidentiality agreement." (*Id.*)

6. Plaintiff was wrong. Defendants have no obligation to independently obtain data on which plaintiff's expert will apparently rely, but, rather than waiting for the long-

promised Neugebauer report, they contacted the ISCR to attempt to obtain the data underlying Dr. Neugebauer's new analysis and were told they could not gain access to the data simply by signing a confidentiality agreement. Defendants were told they would have to follow an elaborate, time-consuming procedure, which includes retaining a qualified researcher, who would have to design a protocol, obtain approval of the protocol from an Institutional Review Board, submit the approved protocol in an application to the ISCR, and obtain approval of the application. This process typically takes five to seven months, and there is no way to expedite it. Defendants memorialized this information in a June 9th letter to plaintiff. (*See* Exhibit C.)

7. In an attempt to find a quicker solution, defendants, in that same letter of June 9, asked plaintiff if Dr. Neugebauer would comply with a court order compelling him to provide these data to defendants. Plaintiff's counsel responded in a letter dated June 18, 2010, but declined to answer this direct question. (*See* Exhibit D hereto.) After a page of sniping attacks, he dismissed the request as a hypothetical that deserved no response: ". . . you ask whether Dr. Neugebauer will comply with a Court Order regarding the confidential data the ISCR has provided. I do not see why I should answer a hypothetical. If you wish for there to be a Court Order, you know how to go about asking for one." (*Id.*)

8. Finally, on June 22, 2010, defendants wrote plaintiff requesting a definitive date on which Dr. Neugebauer's new report would be produced. (*See* Exhibit E hereto.) Plaintiff's counsel's response provided no such date — stating only that "[t]he timing of the release of Dr. Neugebauer's supplemental report is not in [his] control" and that his expectation was that it would be produced "soon." (*See* Exhibit F hereto.)

9. Defendants shall oppose any attempt by plaintiff to submit a new report based on the ISCR data, and shall file appropriate objections if plaintiff makes such an attempt. Nevertheless, since plaintiff has made clear that she will seek to present the new report, fairness requires that defendants have the opportunity to see it now, so that they can assess whether and how to address whatever it may say and can determine what information and resources would be needed for any response. Once defendants have this information, they can then decide what requests, if any, to make to the ISCR.

10. Production of Dr. Neugebauer's new report and the underlying information is required under Rule 705 of the Pennsylvania Rules of Evidence and Rule 4003.5 of the Pennsylvania Rules of Civil Procedure. *See* PA. R. EVID. 705 ("expert must testify as to the facts or data on which the opinion or inference is based"); PA. R. CIV. P. 4003.5(a)(1)(b) (party may require "the other party to have each expert so identified [as a testifying expert] state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion").

11. Any information and data identified as "confidential" will be governed by the protective order in place in this case. (*See* Exhibit G hereto.)

12. Finally, the ISCR approval process on which plaintiff purports to rely in withholding the revised Neugebauer report cannot justify the prejudice to defendants that will result in any further delay in its production. Dr. Neugebauer's agreement with the ISCR does not excuse him (or plaintiff) from complying with a court order requiring production of his analysis and underlying data pursuant to the terms of a protective order. The agreement merely requires Dr. Neugebauer to "immediately notify IDPH" of the court order, after which "[a]ny issue . . .

shall be resolved by IDPH.” (Exhibit H hereto.) Nor can Dr. Neugebauer’s agreement “to submit a detailed report of the analysis and results of his study to the Illinois State Cancer Registry for verification and archiving before any results may be released to a third party” excuse plaintiff’s duty to comply with her discovery and disclosure obligations in this Court. (*Id.*) Any rights that the ISCR may have are protected by Dr. Neugebauer’s notice to it of the court order compelling production of the report and data to defendants.

WHEREFORE, for the reasons set forth herein and in defendants’ memorandum of law, which is incorporated here by reference, defendants respectfully request that this Court grant this Motion and enter an Order compelling plaintiff to produce within one week, pursuant to the Protective Order in place in this case, Dr. Richard Neugebauer’s new expert analysis, along with all information and data relating to that analysis that Dr. Neugebauer obtained from the ICSR.

/s/ Samuel W. Silver

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along with all information and data relating to it that Dr. Neugebauer obtained from the Illinois State Cancer Registry (ISCR). Plaintiff's failure to produce this material in a timely fashion severely prejudices defendants' ability to prepare for the fast-approaching trial in this case, and plaintiff should be compelled to produce it within one week.

I. MATTER BEFORE THE COURT

Pursuant to Pennsylvania Rule of Evidence 705 and Pennsylvania Rule of Civil Procedure 4003.5, defendants Rohm and Haas Company, Rohm and Haas Chemicals LLC, and Morton International, Inc. move this Court to enter an order compelling plaintiff to produce, within one week, any revised expert analysis that plaintiff's epidemiologist, Dr. Richard Neugebauer, plans to present at trial, along with all information and data relating to that analysis that Dr. Neugebauer obtained from the ISCR.

II. QUESTION PRESENTED

Should the Court compel plaintiff to produce, within one week, any revised expert analysis that Dr. Neugebauer plans to present at trial, along with all information and data relating to that analysis that Dr. Neugebauer obtained from the ISCR when (a) plaintiff has suggested since late April that she will submit a revised analysis from Dr. Neugebauer, but has repeatedly failed to do so, (b) trial is just two months away, and (c) Pennsylvania Rule of Evidence 705 and Pennsylvania Rule of Civil Procedure 4003.5 require production of this material?

Suggested Answer: Yes

III. STATEMENT OF FACTS

The discovery cut-off in this case was over a year ago, on June 12, 2009, and the expert report deadline was even earlier — in March 2009. *See* 5/8/09 Revised Case Mgmt. Order. Plaintiff’s epidemiologist, Dr. Neugebauer, submitted his report in this case on November 6, 2008. The report says nothing about ISCR data and does not disclose any intention to prepare a new analysis based on such data. Plaintiff’s August 31, 2009 pretrial memorandum was equally silent on this subject, and plaintiff represented in that memorandum that this case was ready for trial. *See* 8/31/09 Pl. Pretrial Mem. at 3.

On April 27, 2010, just a month before the original June 2010 trial date, plaintiff e-mailed defendants that Dr. Neugebauer was doing a new analysis of brain cancer rates based on data he had received from the ISCR. *See* Ex. A. Plaintiff said that while the data were confidential (and presumably would not be disclosed voluntarily), Dr. Neugebauer planned to prepare a new report setting out his “analysis and interpretation” of the confidential data. *Id.* Plaintiff said this report would be produced “as soon as possible.” *Id.*

Defendants are still waiting to receive Dr. Neugebauer’s new report, which apparently was completed more than a month ago. In a letter dated May 19, 2010, plaintiff wrote defendants that Dr. Neugebauer had finished his report, but that plaintiff could not produce it until the ISCR had “verified” the data Dr. Neugebauer had used. *See* Ex. B. The letter stated that “we expect word from [the ISCR] in the next couple of weeks.” *Id.* A “couple of weeks” have since turned into more than a month, and defendants still do not have the promised report or even a date certain for production of this report.

In his letter of May 19, plaintiff's counsel mistakenly represented that defendants could access the ISCR data if they "join[ed] in [Dr. Neugebauer's ISCR] request" by "pay[ing] the fee and sign[ing] a similar confidentiality agreement." Ex. B. Plaintiff was wrong. Defendants have no obligation to independently obtain data on which plaintiff's expert will apparently rely, but, rather than waiting for the long-promised Neugebauer report, defendants contacted the ISCR to attempt to obtain the data underlying Dr. Neugebauer's new analysis and were told they could not gain access to the data simply by signing a confidentiality agreement. Rather, they would have to follow an elaborate, time-consuming procedure, which includes retaining a qualified researcher, who would have to design a protocol, obtain approval of the protocol from an Institutional Review Board, submit the approved protocol in an application to the ISCR, and obtain approval of the application. This process typically takes five to seven months, and there is no way to expedite it. Defendants memorialized this information in a June 9th letter to plaintiff. *See* Ex. C.

In an attempt to find a quicker solution, defendants, in that same letter of June 9, asked plaintiff if Dr. Neugebauer would comply with a court order compelling him to provide these data to defendants. The June 18, 2010 response by plaintiff's counsel dismissed defendants' request as a hypothetical that deserved no answer: ". . . you ask whether Dr. Neugebauer will comply with a Court Order regarding the confidential data the ISCR has provided. I do not see why I should answer a hypothetical. If you wish for there to be a Court Order, you know how to go about asking for one." Ex. D.

Finally, on June 22, 2010, defendants wrote plaintiff requesting a definitive date on which Dr. Neugebauer's new report would be produced. *See* Ex. E. Plaintiff's counsel's

response provided no such date — stating only that “[t]he timing of the release of Dr. Neugebauer’s supplemental report is not in [his] control” and that his expectation was that it would be produced “soon.” *See* Ex. F.

Dr. Neugebauer’s agreement with the ISCR contains no provision excusing him from complying with a court order requiring production of his analysis and underlying data pursuant to the terms of a protective order. The agreement merely requires Dr. Neugebauer “to submit a detailed report of the analysis and results of his study to the Illinois State Cancer Registry for verification and archiving before any results may be released to a third party,” and says he must “immediately notify IDPH” of any court order, after which “[a]ny issue . . . shall be resolved by IDPH.” Ex. H.

IV. ARGUMENT

Despite the fact that the expert report and discovery deadlines expired over a year ago, plaintiff now seeks to change the expert record in this case just before trial (without even having filed a motion for extraordinary relief as is required by this Court’s rules, *see* Local Rule *208.3(b)(1)(H); Trial Div. Gen. Ct. Reg. 95-1). Plaintiff’s April 27, 2010 “e-mail alert” stating that she planned to submit a revised analysis from Dr. Neugebauer based on data he had received from the ISCR came almost two months ago, just a month before the original June 2010 trial date, and defendants are still waiting for the revised report. Defendants will oppose any attempt by plaintiff to submit a new report based on the ISCR data, and shall file appropriate objections if plaintiff makes such an attempt. Nevertheless, since plaintiff has made clear that she will seek to present the new report, fairness requires that defendants have the opportunity to see it now, so that they can assess whether and how to address whatever it may say and can determine what

information and resources would be needed for any response. Once defendants have this information, they can then decide what requests to make to the ISCR.

Production of Dr. Neugebauer's new report and the underlying information is required under Rule 705 of the Pennsylvania Rules of Evidence and Rule 4003.5 of the Pennsylvania Rules of Civil Procedure. *See* PA. R. EVID. 705 ("expert must testify as to the facts or data on which the opinion or inference is based"); PA. R. CIV. P. 4003.5(a)(1)(b) (party may require "the other party to have each expert so identified [as a testifying expert] state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion"); *see also* PA. R. CIV. P. 4003.5(c) ("the direct testimony of the expert at trial may not be inconsistent with or go beyond the fair scope of his or her . . . separate report, or supplement thereto"). The purpose of these rules is "to avoid unfair surprise by enabling the adversary to prepare a response to the expert testimony," *Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc.*, 348 Pa. Super. 285, 290, 502 A.2d 210, 212 (1985), and to put "[t]he salient facts relied upon as the basis of the expert opinion . . . in the record so that the jury may evaluate the opinion," PA. R. EVID. 705 cmt.

In short, these rules are designed to prevent parties from doing what plaintiff is attempting here. Plaintiff knows that if and when Dr. Neugebauer's new report is eventually produced, it will be of no use to defendants without the "confidential" data on which it is based. Accordingly, plaintiff must produce not only the report but also the underlying information in order to give defendants the opportunity to meaningfully respond. Any information and data identified as "confidential" will be governed by the protective order in place in this case. *See* Ex. G.

The ISCR approval process on which plaintiff purports to rely in withholding the revised report cannot justify the prejudice to defendants that will result in any further delay in its production. Dr. Neugebauer's agreement with the ISCR does not excuse him (or plaintiff) from complying with a court order requiring production of his analysis and underlying data pursuant to the terms of a protective order. The agreement merely requires Dr. Neugebauer to "immediately notify IDPH" of the court order, after which "[a]ny issue . . . shall be resolved by IDPH." Ex. H. Nor can Dr. Neugebauer's agreement to "report of the analysis and results of his study to the Illinois State Cancer Registry for verification and archiving before any results may be released to a third party" excuse plaintiff's duty to comply with her discovery and disclosure obligations in this Court. (*Id.*) Any rights that the ISCR may have are protected by Dr. Neugebauer's notice to it of the court order compelling production of the report and data to defendants.

